

The Opaque Glass Ceiling: How Will Gender Neutrality in Combat Affect Military Sexual Assault Prevalence, Prevention, and Prosecution?

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"It's about time! . . . Women have been on the 'front lines,' per se, for years. Now they're getting credit and authorization that is long overdue."

-Laura Cannon, a 2001 West Point graduate who took part in the initial invasion of Iraq with the Army's 3rd Infantry Division, ultimately spending seven months there.¹

"Military women are already complaining about increased sexual assaults, and of course those problems will skyrocket. Only men will be deemed at fault because it is feminist ideology that men are innately batterers and women are victims."

-Phyllis Schlafly, Conservative Activist²

"We've had this ongoing issue with sexual harassment, sexual assault. I believe it['s] because we've had separate classes of military personnel at some level . . . [W]hen you have one part of the population that is designated as 'warriors' and one part that is designated as something else, that disparity begins to establish a psychology that, in some cases, led to that environment. I have to

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¹ Bill Briggs, *Female vets cheer new era for women in combat: 'It's about time!'*, NBCNEWS.COM (Jan. 23, 2013), http://usnews.nbcnews.com/_news/2013/01/23/16665551-female-vets-cheer-new-era-for-women-in-combat-its-about-time?lite.

² Phyllis Schlafly, *Schlafly: Panetta's Cowardly Decision*, HUMAN EVENTS BLOG (Jan. 29, 2013, 8:21 AM), <http://www.humanevents.com/2013/01/29/schlaflypanetta-cowardly-decision/>.

believe the more we treat people equally, the more likely they are to treat each other equally."

-General Martin Dempsey, Chairman of the Joint Chiefs of Staff³

I. INTRODUCTION

From 1994 until 2013, 237,000 combat arms positions in the military were closed to women.⁴ In theory, however, that all changed on January 24, 2013.⁵ Although thousands of women have fought alongside their male counterparts over the past twelve years of war in Iraq and Afghanistan,⁶ U.S. military leaders recently announced that they would formally lift the ban on women serving in combat positions.⁷ According to former Secretary of Defense Leon Panetta, women have become an "integral part" of the military, and have already demonstrated their willingness to fight. In Panetta's words, "it's clear to all of us that women are contributing in unprecedented ways to the military's mission of defending the nation."⁸

Women became a permanent part of the military's service, as opposed to separate auxiliaries, as a result of a 1948 act of Congress, but continued to be excluded from ground-combat jobs, such as the Infantry, Armored Cavalry, and Field Artillery branches.⁹ Over the past twenty years in particular, women have consistently challenged stereotypes that have historically prevented them from assuming prominent roles in all-male units. Women comprised combat-related

³ Ashley Portero, *Women In Combat Units Could Help Reduce Sexual Assaults: US Joint Chiefs Chairman*, INTERNATIONAL BUSINESS TIMES (Jan. 25, 2013), <http://www.ibtimes.com/women-combat-units-could-help-reduce-sexual-assaults-us-joint-chiefs-chairman-1039244>.

⁴ Stephanie Gaskell & Kate Brannen, *Women in Combat: How Much Will Change?*, POLITICO (Jan. 24, 2013, 1:24 PM), <http://www.politico.com/story/2013/01/women-in-combat-female-draft-unclear-86679.html> (explaining the 1994 Direct Combat Definition and Assignment Rule); see also EQUAL OPPORTUNITY AND SEXUAL HARASSMENT PROGRAM, https://atiam.train.army.mil/catalog/view/100.ATSC/699B6F09-D37A-4E0E-9983-1D78280BD5BC-1275687005741/vmp/tpa35/cd_start.htm (last visited May 13, 2013) (The 1994 change in policy resulted in ninety-one percent of all Army career fields, sixty-seven percent of all Army positions, eighty-seven percent of all enlisted MOS specialties, ninety-seven percent of warrant officer specialties, and ninety-seven percent of officer specialties becoming open to women.).

⁵ See Gaskell & Brannen, *supra* note 4.

⁶ David Lerman, *Women to Take Combat Roles by 2016*, STARS AND STRIPES (July 26, 2013), at 5 (stating that more than 280,000 female troops have served in war zones over the past decade).

⁷ Chris Lawrence, *Military to open combat jobs to women*, CNN SECURITY BLOG (Jan. 23, 2013), http://security.blogs.cnn.com/2013/01/23/military-to-open-combat-jobs-to-women/?hpt=hp_c1.

⁸ Secretary of Defense Leon E. Panetta, Statement on Women in Service at the Pentagon Briefing Room (January 24, 2013), available at <http://www.defense.gov/speeches/speech.aspx?speechid=1746> [hereinafter Panetta Statement].

⁹ Lerman, *supra* note 6.

missions in Grenada, Panama, and the Gulf War.¹⁰ The statistics are telling: 9.7% of Army personnel and 7.2% of the total armed forces deployed in the 1991 Gulf War constituted female service members.¹¹ During the Gulf War conflict, thirteen women sacrificed their lives, and two women were prisoners of war.¹² As of September 20, 2010, women accounted for 14.5% of active duty military personnel.¹³ From March 19, 2003 through February 6, 2010, 104 military women died in Operation Iraqi Freedom, and from October 7, 2001 through February 6, 2010, twenty women died in Operation Enduring Freedom.¹⁴ That number has now doubled, and as of January 17, 2013, totaled forty-two.¹⁵ In 2005, Sergeant Leigh Ann Hester became the first woman since World War II to receive the Silver Star for valor as a result of her actions during a firefight in Iraq.¹⁶ Last but not least, in 2008, Ann E. Dunwoody became the first woman to become a four-star general, a career-topping honor reserved only for the best of the best.¹⁷ Clearly, despite the lack of formal recognition, women have left their mark on recent battlefields and represent some of the nation's finest military heroes. As Panetta points out, "[t]hey're fighting and they're dying together. And the time has come for our policies to recognize that reality."¹⁸

On the other hand, while the prominence of women in combat has increased, so too have sexual assaults. A recent Veterans Affairs [VA] study is particularly

¹⁰ Kathy L. Snyder, *An Equal Right to Fight: An Analysis of the Constitutionality of Laws and Policies That Exclude Women from Combat in the United States Military*, 93 W. VA. L. REV. 421, 431, 450–51 (1991).

¹¹ Angela Rollins, *Act Like a Lady!: Reconsidering Gender Stereotypes & the Exclusion of Women from Combat in Light of Challenges to "Don't Ask, Don't Tell"*, 36 S. ILL. U. L.J. 355, 358–59 (2012); see also Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women From Combat*, 57 ALA. L. REV. 303, 328 (2005) (noting that a total of 40,000 female troops deployed in support of Operation Desert Storm).

¹² Major Jeffrey S. Dietz, *Breaking the Ground Barrier: Equal Protection Analysis of the U.S. Military's Direct Ground Combat Exclusion of Women*, 207 MIL. L. REV. 86, 96–97 (2011).

¹³ Rollins, *supra* note 11; see also Wyatt Olson, *Sexual harassment, assault more likely for deployed women who saw 'combat'*, STARS AND STRIPES (Sept. 30, 2013), <http://www.stripes.com/news/sexual-harassment-assault-more-likely-for-deployed-women-who-saw-combat-1.243735> (describing how "[w]omen account for about 200,000 of the military's 1.4 million active-duty personnel").

¹⁴ Rollins, *supra* note 11.

¹⁵ Hannah Fischer, *U.S. Military Casualty Statistics: Operation New Dawn, Operation Iraqi Freedom, and Operation Enduring Freedom* 11 (Feb. 5, 2013), available at <http://www.fas.org/sgp/crs/natsec/RS22452.pdf>; see also *Operation Enduring Freedom Fatalities*, ICASUALTIES, available at <http://icasualties.org/OEF/Fatalities.aspx>; *Operation Iraqi Freedom Fatalities*, ICASUALTIES, available at <http://icasualties.org/Iraq/IraqiDeaths.aspx>.

¹⁶ Rachel Martin, *Silver Star Recipient a Reluctant Hero*, NPR (Feb. 22, 2011), <http://www.npr.org/2011/02/22/133847765/silver-star-recipient-a-reluctant-hero>; see also Major Scott E. Dunn, *The Military Selective Service Act's Exemption of Women: It Is Time to End It*, 431 ARMY LAW. 1, 21 (2009).

¹⁷ Rollins, *supra* note 11, at 359.

¹⁸ Panetta Statement, *supra* note 8.

illustrative of this trend: About half of women sent to Iraq or Afghanistan report being sexually harassed, and nearly one in four say they were sexually assaulted.¹⁹ The anonymous study suggests a far higher prevalence of sexual misconduct against women in war zones than is reflected by complaints otherwise gathered by the various service branches.²⁰ Thus, although the eradication of the combat ban sounds historic and progressive, the less popular view is that the policy will prove far less revolutionary in practice than it sounds in theory due to the prevalence of the sexual assault crisis. This article will explore the seemingly paradoxical relationship between the two phenomena. Part I will detail the nature of the ongoing sexual assault crisis, including past and present attempts at reform; Part II will describe the nature of the proposed inclusion policy, including challenges associated with integration; Part III will consider the relationship between sexual assaults and the proposed inclusion policy; and Part IV will advocate for a change in deep-rooted military culture to reduce sexual assaults and facilitate the transition from a gender-restrictive to a gender-neutral force. This article will argue that because the policy of opening historically male-only combat positions to women will cause an increase in the frequency of service-member on service-member sexual assaults, nothing short of a drastic change in military culture will ensure the long-term success of such a policy.

II. NATURE OF THE SEXUAL ASSAULT CRISIS²¹

Since the integration of women in the regular armed services in the 1970s, there have been numerous reports of sexual assaults against women. "Sexual assault" refers to a broad range of sex-crimes, "from rape and indecent assault to 'attempts to commit these offenses.'"²² Despite preventative policies and programs, sexual assaults in the military are currently being reported at an

¹⁹ Gregg Zoroya, *VA finds sexual assaults more common in war zones*, USA TODAY (Dec. 26, 2012), <http://www.usatoday.com/story/news/nation/2012/12/26/va-finds-sexual-assaults-more-common-in-war-zones/1793253/>.

²⁰ *Id.* See also Melissa Jeltsen, *Military Sexual Assaults in Combat Zones Happen Frequently: Study*, HUFFINGTON POST (Dec. 27, 2012), http://www.huffingtonpost.com/2012/12/27/military-sexual-assaults_n_2370099.html (describing how a study that queried 1,100 women who served in Iraq or Afghanistan revealed that rape was reported by 22.8% of women, and 48.6% of women said they had experienced some form of sexual harassment while deployed).

²¹ Karen Parrish, *Hagel: Solving Crisis Will Take 'All of Us'*, BAYONET & SABER, May 22, 2013, at A1-A3 (Army Lieutenant General Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, has termed the ongoing sexual assault situation in the military a "crisis." Defense Secretary Hagel also calls it a "complex crime with many potential contributing factors, including popular culture, accountability, and alcohol use.").

²² Mitsie Smith, *Adding Force Behind Military Sexual Assault Reform: The Role of Prosecutorial Discretion in Ending Intra-Military Sexual Assault*, 19 BUFF. J. GENDER L. & SOC. POL'Y 147, 148-50 (2011); see also Brittany Kubes, *Attacked from All Sides: Increased Sexual Assault Reports Within the U.S. Military*, 15 PUB. INT. L. REP. 125, 126 (2010).

unprecedented rate.²³ According to a recent report, the rate of violent sexual crime has increased sixty-four percent since 2006, and “rape, sexual assault, and forcible sodomy were the most frequent violent sex crimes committed in 2011.”²⁴ Thus, “while women comprise 14 percent of the Army ranks, they account for 95 percent of all sex crime victims.”²⁵ The rate of sexual assault for women in the military is approximately double what one might expect to find among civilians; according to Department of Defense [DoD] statistics, one in three female service-members has reported some form of sexual assault, compared to one in six female civilians.²⁶ Furthermore, these numbers do not reveal “extreme rates of rape” because approximately eighty percent of sex crimes (compared to sixty percent in civilian society) are not reported while women remain in service.²⁷ Part of the issue is inherent in the very structure of the system itself: under the UCMJ, the accused’s superior commander has the authority to make an independent determination regarding further action in sexual assault cases, including whether the case proceeds to a court martial or is dealt with through lesser adverse administrative action.²⁸ According to the critically acclaimed documentary *The Invisible War*, “about one in four service-member victims don’t report an assault because the person to whom they must report it is the perpetrator.”²⁹

²³ Micah Zenko & Amelia Mae Wolf, *We’re All to Blame for Sex Assault Crisis*, STARS AND STRIPES, May 26, 2013, at 22 (“[N]one of [these measures] seems to be having an effect. Nancy Parrish, president of Protect our Defenders, referred to these efforts as ‘half-hearted, half-measured reform Band-Aids.’”). Compare DEP’T OF DEFENSE, CALENDAR YEAR 2004 REPORT—SEXUAL OFFENSES INVOLVING MEMBERS OF THE ARMED FORCES (May 2005), 1 (citing a total of 1,700 reported sexual assaults involving a service member victim and/or service member alleged offender) and DEP’T OF DEFENSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2012 (May 2013), 57 (citing a total of 3,374 reported service member-related sexual assaults).

²⁴ Anna Mulrine, *Pentagon report: Sexual assault in the military up dramatically*, CHRISTIAN SCIENCE MONITOR (Jan. 19, 2012), <http://www.csmonitor.com/USA/Military/2012/0119/Pentagon-report-Sexual-assault-in-the-military-up-dramatically>.

²⁵ *Id.*

²⁶ U.S. DEP’T OF LABOR, WOMEN’S BUREAU, TRAUMA-INFORMED CARE FOR WOMEN VETERANS EXPERIENCING HOMELESSNESS: A GUIDE FOR SERVICE PROVIDERS 11 (July 2011), available at <http://www.dol.gov/wb/trauma/WBTraumaGuide2011.pdf>.

²⁷ H. Patricia Hynes, *Military Sexual Abuse: A Greater Menace Than Combat*, TRUTHOUT (Jan. 26, 2012, 4:06 AM), <http://truth-out.org/news/item/6299:military-sexual-abuse-a-greater-menace-than-combat>.

²⁸ Memorandum from the Secretary of Defense on withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases (Apr. 20 2012), available at http://www.dod.gov/dodge/images/withhold_authority.pdf. “Lesser adverse administrative action” includes, but is not limited to, non-judicial punishment, letters of reprimand or counseling, or even a simple verbal counseling. See NONJUDICIAL PUNISHMENT PROCEDURE, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.); RULE FOR COURTS-MARTIAL 306, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).

²⁹ Molly O’Toole, *Military Sexual Assault Epidemic Continues to Claim Victims as Defense Department Fails Females*, HUFFINGTON POST (Oct. 6, 2012), http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department_n_1834196.html.

Calculations by *The Huffington Post* reveal that “a servicewoman was nearly 180 times more likely to have become a victim of military sexual assault [in 2011] . . . than to have died while deployed during the last 11 years of combat in Iraq and Afghanistan.”³⁰ These calculations are based on a report by the Sexual Assault Prevention and Response Office [SAPRO], which found that out of an estimated 19,000 sexual assaults, a mere fourteen percent—or 3,192—were reported from October 1, 2010 through September 31, 2011.³¹ Although sexual assault claims both male and female victims, DoD statistics suggest that the majority of victims were female junior enlisted personnel (E1–E4) under the age of twenty-five, and the majority of perpetrators were male, under the age of thirty-five, and, in many cases, higher-ranking.³² This trend was confirmed by a recent VA study of female Iraq and Afghanistan veterans.³³ The study revealed that the service member perpetrators are often from within the victim’s own unit, and forty-seven percent of women surveyed said that person held a higher rank.³⁴ Another presentation citing data from The Millenium Cohort Study³⁵ found that military women who experienced direct combat between 2001 and 2004 were “two and a half times more likely to say they had been sexually assaulted during those years than female service members who had never been to war.”³⁶ Thus, sadly, in the words of former California Democratic Representative Jane Harman, “[a] woman who signs up to protect her country is more likely to be raped by a fellow soldier than killed by enemy fire.”³⁷

Ultimately, military sexual assault victims “are often forced to choose between frequent contact with the perpetrators or sacrificing their career goals to protect themselves from retaliation.”³⁸ As a result, many women suffer from severe military sexual trauma: “One striking VA study of more than 300 women veterans enrolled in a clinical program for stress disorders found that ‘sexual stress (stress related to sexual harassment and abuse) was almost 4 times more influential than duty-related stress in the development of P[ost] T[raumatic] S[tress]

³⁰ *Id.*

³¹ *Id.*; DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2011 28, 32–33 (April 2012) [hereinafter DoD Annual Report for Fiscal Year 2011]; *see also* DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2012 57 (May 2013) (noting a six percent increase in service member sexual assaults from FY11 to FY12).

³² DoD Annual Report for Fiscal Year 2011, *supra* note 31, at 53–55.

³³ Zoroya, *supra* note 19.

³⁴ *Id.*

³⁵ *See generally* THE MILLENNIUM COHORT STUDY, <http://www.millenniumcohort.org> (last visited Mar. 23, 2014).

³⁶ *Id.*

³⁷ Hynes, *supra* note 27.

³⁸ Jessica Stern, *The military must take a harder line against sexual assault*, THE WASH. POST (Feb. 18, 2011), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/17/AR2011021705832.html>.

D[isorder].”³⁹ A 2005 study of 30,000 Gulf War veterans added yet another twist to this ongoing phenomenon, revealing that sexual assault during military deployment was far more likely to put victims at risk of PTSD than “high” combat exposure.⁴⁰

To add insult to injury, if a service member rapes or sexually assaults a fellow service member, chances are that service member will not be severely punished.⁴¹ In the civilian world, prosecutions and conviction rates for rape are at an all time high; the conviction rate for rape increased from fifty-eight percent in 2008 to sixty-three percent in 2013.⁴² In the military, however, the perpetrator has an estimated 86.5% chance of keeping sexual assault crimes a secret and a 92% percent chance of avoiding a court martial.⁴³ In one of the greatest ironies, the military is the only legal institution in the United States that, in theory, still authorizes the death penalty for rape,⁴⁴ yet given the DoD’s “dismal” record of prosecuting assaults, it is evident that most perpetrators are not even being punished, much less facing the most stringent of all possible sentences.⁴⁵ The DoD counts as a small victory the increased use of court martial charges over the past five years and the decreased reliance on non-judicial punishments.⁴⁶ These figures, however, are misleading because they “only represent[] the court martial charges that were *initiated*”⁴⁷ and, during FY2011, fail to account for the court martial charges that were dismissed against ninety-one subjects.⁴⁸ By the end of FY2011, only 240 cases proceeded to trial by court martial,⁴⁹ of which 148 offenders served

³⁹ Hynes, *supra* note 27.

⁴⁰ *Id.*; see also Cynthia A. LeardMann, MPH et al., *Combat Deployment is Associated with Sexual Harassment or Sexual Assault in a Large, Female Military Cohort*, 23-4 WOMEN’S HEALTH ISSUES e215, e215–16 (2013), available at <http://download.journals.elsevierhealth.com/pdfs/journals/1049-3867/PIIS1049386713000388.pdf> (last visited Oct. 30, 2013); Priscilla Schulz, *Military Sexual Trauma*, CENTER FOR DEPLOYMENT PSYCH., <http://www.deploymentpsych.org/disorders/sexual-assault-main>; *Facts About Sexual Assault and Harassment in the Military*, AFTERDEPLOYMENT.ORG, <http://www.afterdeployment.org/sites/default/files/pdfs/client-handouts/mst-sexual-assault-harassment.pdf> (last visited Oct. 30, 2013); Thomas Maugh, *Study Details Sex-Abuse Rates of Deployed Female Soldiers*, LA TIMES, Oct. 28, 2008, <http://articles.latimes.com/2008/oct/28/science/sci-harass28>.

⁴¹ Hynes, *supra* note 27.

⁴² Owen Bowcott, *Rape conviction rate at an all-time high*, THE GUARDIAN (Apr. 22, 2013), <http://www.theguardian.com/society/2013/apr/23/rape-conviction-rate-high>.

⁴³ Jackie Speier, *Why rapists in military get away with it*, CNN OPINION (Jun. 21, 2012), <http://www.cnn.com/2012/06/21/opinion/speier-military-rape>.

⁴⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, Maximum Punishment Chart, App. 12, A12-4 (2012 ed.).

⁴⁵ *Sexual Violence and the Military*, N.Y. TIMES, Mar. 8, 2012.

⁴⁶ DoD Annual Report for Fiscal Year 2011, *supra* note 31, at 42.

⁴⁷ O’Toole, *supra* note 29 (emphasis added).

⁴⁸ DoD Annual Report for Fiscal Year 2011, *supra* note 31, at 43.

⁴⁹ *Id.* at 32, 41–45.

jail sentences and 122 were ultimately discharged.⁵⁰ According to SAPRO's 2011 report, in most cases, service members were subjected to one or more of four punishments, including confinement, reduction in rank, a fine, or discharge from the military.⁵¹ Even when these punitive measures are enforced, however, they may not always mitigate future risks: "Repeat offenders, according to the report, commit 90 percent of all assaults."⁵²

Furthermore, an estimated ten percent of accused perpetrators resigned in 2011 instead of facing a court martial, and one in three convicted sex offenders remain in the military.⁵³ Part of the reason for this may be the fact that "[f]ollowing a conviction, the convening authority reviews the case and has broad powers to take actions, including suspending the sentence, disapproving a finding, or lowering a sentence."⁵⁴ This very scenario occurred recently in the case of convicted Air Force fighter pilot Lieutenant Colonel James Wilkerson. Lieutenant General Craig A. Franklin, commander of the Third Air Force, overruled the guilty verdict of an all-male jury because he "had nagging doubts about the accuser's credibility."⁵⁵ General Franklin's actions not only undermine the legitimacy of trial by jury but also perpetuate the prevailing resentment toward commanders who refuse to hold troops accountable for sex crimes. In a six-page memorandum detailing his decision, Franklin gave weight to evidence that had been declared inadmissible at trial, but he was not physically present for the trial himself; Wilkerson was originally sentenced to a year in prison and discharge from the Air Force but has since returned to active duty.⁵⁶ As a result, Defense Secretary Chuck

⁵⁰ Katie Halper, *Nearly a Third of Fired Military Commanders Were Canned Because of Their Penises*, JEZEBEL (Jan. 22, 2013), <http://jezebel.com/5977856/nearly-a-third-of-fired-military-commanders-were-canned-because-of-their-penises>.

⁵¹ DoD Annual Report for Fiscal Year 2011, *supra* note 31 at 45.

⁵² O'Toole, *supra* note 29.

⁵³ Halper, *supra* note 50.

⁵⁴ Jodie Friedman, *Reporting Sexual Assault of Women in the Military*, 14 CARDOZO L.J. & GENDER 375, 385 (2008).

⁵⁵ Craig Whitlock, *Air Force general defends overturning sexual-assault conviction*, WASH. POST (Apr. 10, 2013), http://articles.washingtonpost.com/2013-04-10/world/38428317_1_franklin-commanders-conviction; see also Letter from Craig A. Franklin, Lieutenant General, USAF Commander, Third Air Force, to Michael Donley, the Secretary of the Air Force at the Department of Defense, (Mar. 12, 2013) (letter available at <http://www.foia.af.mil/shared/media/document/AFD-130403-022.pdf>). General Franklin ultimately retired "following months of public criticism." Kristin Davis, *General who overturned Aviano Sex Assault Conviction to Retire*, AIR FORCE TIMES (Jan. 8, 2014), <http://www.airforcetimes.com/article/20140108/CAREERS03/301080013/General-who-overturned-Aviano-sex-assault-conviction-retire>.

⁵⁶ Franklin, *supra* note 55; see also Lolita C. Baldor, *Air Force General Defends Overturning Sex Assault Verdict*, ARMY TIMES (Apr. 10, 2013), <http://www.armytimes.com/article/20130410/NEWS/304100018/Air-Force-general-defends-overturning-sex-assault-verdict> ("A jury convicted Wilkerson, a former inspector general at Aviano Air Base in Italy, Nov. 2 on charges of abusive sexual contact, aggravated sexual assault, and three instances of conduct unbecoming of an officer and a gentleman.")

Hagel has called for “reforms to the military justice system, including eliminating a commander’s power to overturn a court-martial.”⁵⁷

For those who are convicted of sexual assault offenses, the consequences are often relatively minor. For example, on April 4, 2013, Major General Ralph Baker, commander of the Combined Joint Task Force-Horn of Africa, was relieved from his position and fined a portion of his pay following sexual assault allegations.⁵⁸ The significance of his punishment, however, is paltry; Baker has more than enough time in service to retire with full benefits and faces no prison time. Change starts at the top, and until those at the top are held accountable for their actions in some meaningful way, the trickle-down effect will remain nonexistent.⁵⁹ As Defense Secretary Chuck Hagel recently quipped, “[i]t’s not good enough just to say zero tolerance. The whole chain of command needs to be accountable for this all the way down.”⁶⁰ In some cases, this may entail removing and replacing the entire chain of command, as the recent arrest of Air Force Lieutenant Colonel Jeff Krusinski, the head of the Air Force’s sexual assault prevention program, suggests. Krusinski, the Air Force officer responsible for enforcing sexual assault-related policies and punishing those who commit infractions, was arrested for sexual battery on May 6, 2013.⁶¹ As is typical in cases

⁵⁷ Molly O’Toole, *Air Force General Defends Decision to Overturn Sex Assault Conviction: Criticism is “Utter Nonsense”*, HUFFINGTON POST (Apr. 10, 2013), http://www.huffingtonpost.com/2013/04/10/air-force-sexual-assault_n_3055505.html.

⁵⁸ Associated Press, *Maj. Gen. Ralph Baker of US Africa Command Fired Over Alcohol, Sex Charges*, CHRISTIAN SCIENCE MONITOR (Apr. 5, 2013), <http://www.csmonitor.com/USA/Latest-News-Wires/2013/0405/Maj.-Gen.-Ralph-Baker-of-US-Africa-Command-fired-over-alcohol-sex-charges>.

⁵⁹ In perhaps one of the greatest ironies, the Army’s “top prosecutor for sexual assault cases,” Lieutenant Colonel Joseph Morse, was recently accused of attempting to kiss and grope another lawyer at a 2011 sexual-assault legal conference. The future of this case remains unclear; as of March 6, 2014, charges had not yet been preferred. Chris Carroll & Josh Vandiver, *Army’s Top Sex Assault Prosecutor Suspended After Assault Allegation*, STARS & STRIPES (Mar. 6, 2014), <http://www.stripes.com/army-s-top-sex-assault-prosecutor-suspended-after-assault-allegation-1.271461>.

⁶⁰ Judy Woodruff, Transcript, *Survivors Share Experiences of Sexual Assault in the Military*, PBS (Mar. 13, 2013), http://www.pbs.org/newshour/bb/military/jan-june13/sexualassault_03-13.html.

⁶¹ Jim Miklaszewski, Courtney Kube & Tracy Connor, *Air Force’s sex-abuse prevention honcho charged with sexual battery*, NBC NEWS (May 7, 2013), <http://usnews.nbcnews.com/news/2013/05/06/18089279-air-forces-sex-abuse-prevention-honcho-charged-with-sexual-battery?lite>. The sexual battery charge against Krusinski was later amended to a generic assault charge, though the details of the incident that led to the original charge and arrest remain unclear. For additional details, see Matthew Barakat, *Sexual Battery Charge Dropped for Jeffrey Krusinski, Leader of Military Sexual Assault Response Unit*, HUFFINGTON POST (July 18, 2013, 4:31 PM), http://www.huffingtonpost.com/2013/07/18/jeffrey-krusinski-charge-dropped_n_3618658.html. For evidence of other recent sexual assault scandals, see Marie Tessier, *Sexual Assault Pervasive in Military, Experts Say*, WOMEN ENEWS.ORG (Mar. 30, 2013), <http://womensenews.org/story/rape/030330/sexual-assault-pervasive-military-experts-say#.UnBFexbHKZZ> (The “concern about the assaults on female members of the military is

like this, the Air Force requested jurisdiction, which may or may not be a good thing; as Greg Jacob, policy director at the Service Women's Action Network points out, "[t]he military has proven time and again that the current system of prosecuting these cases is broken."⁶²

A. Attempts at Reform

The first era of reform occurred in the early 1990s. Several scandals, most notably the infamous Tailhook Scandal in 1991, resulted in pledges among top officials to combat sexual assault within the military.⁶³ After a widely reported Air Force Academy scandal in 2003, the DoD promised again to aggressively respond to sexual assault incidents.⁶⁴ To address the ongoing crisis, military leaders established The Defense Task Force on Sexual Assault in the Military Services, which resulted in a twenty-four percent increase in reporting from 2005 through 2006.⁶⁵ The DoD also pledged to continue the development of the Defense Sexual Assault Incident Database [DSAID] to aid in analyzing reports to enhance accountability⁶⁶ and established a special task force in 2009 to study the issue and make recommendations.⁶⁷

In addition, in an attempt to create a central organization of "accountability and oversight for sexual assault policy," the DoD instituted SAPRO.⁶⁸ A former director of SAPRO claims that "the recent increase in the number of sexual assaults can be attributed to the improved reporting methods and the [DoD's] . . . new policy of encouraging victims to come forward with information regarding sexual assault."⁶⁹ On the other hand, there is some indication that SAPRO has caused military men and women to "become hypersensitive to any hint of impropriety by fellow soldiers, which then leads to the rising level of reports."⁷⁰ Prior to the official change in policy, a Marine Corps survey revealed that:

male Marines feared being falsely accused of sexual harassment or assault and that women's 'personal issues' might affect unit cohesion if

especially high now, with the nation at war and the recent removal of four high-ranking officials from their posts at the U.S. Air Force Academy following an investigation of sexual assaults there.").

⁶² Miklaszewski, Kube, & Connor, *supra* note 61.

⁶³ Smith, *supra* note 22, at 148–49.

⁶⁴ *Id.* at 149.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Stern, *supra* note 38.

⁶⁸ Kubes, *supra* note 22, at 126.

⁶⁹ *Id.*

⁷⁰ *Id.*

the ban [on women in combat] was lifted . . . These worries harken back to the deep rooted perceptions of gender roles prevalent in the military.⁷¹

Unfortunately, increased reports may also reflect nothing less than an increase in the total number of assaults, in part due to the belief that perpetrators believe they will not be held accountable for their acts. Other factors, such as lack of privacy particularly during wartime, may also contribute to the overall number of reports; in remote locations, for instance, military service members live in close quarters, and women are typically unevenly distributed at bases, making up only one in ten soldiers at some bases.⁷² Of particular concern is the fact that in deployed environments, “women who underwent ‘combat-like’ experiences in Iraq and Afghanistan are much more likely to report sexual harassment and sexual assault compared with other deployed women.”⁷³ A study published in the August edition of *Women’s Health Issues Journal* used data from more than 13,000 military women who have been tracked in the Millennium Cohort Study, which began in 2001. Participants filled out an extensive “baseline” questionnaire and repeated the DoD research survey at three-year intervals.⁷⁴ The findings indicate that risk factors are related to the type of environment—such as combat experience and branch of service—and to “resiliency factors” such as changes in marital status; ultimately, the study concludes it would be wise to target prevention efforts in these areas.⁷⁵

Thus, despite an increase in reporting, there are indications that reforms have not gone far enough, and, were it not for certain constraints, the number of reports would be even greater. Many women, for instance, fear not being believed or being accused of lying by their own commanders and harbor serious doubts that their claims will gain any traction in a closed, rigidly male hierarchal institution.⁷⁶ According to *The Invisible War*, “even commanders without personal involvement in the case see an accusation of a rape as potentially harmful for their own career, and often sweep investigations under the rug.”⁷⁷ Five women talked to the producers of *The Invisible War* after reporting being assaulted by an officer while serving at the Marine Barracks in Washington, D.C. Four were punished or

⁷¹ Kylie Schultz, *Women in Combat: Lifting the Ban for Better or Worse?*, THE INTERNATIONAL (Feb. 3, 2013), <http://www.theinternational.org/articles/329-women-in-combat-lifting-the-ban-for-bett>.

⁷² Kubes, *supra* note 22, at 127–28.

⁷³ Olson, *supra* note 13.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See, e.g., *Rape and the U.S. Military: The Betrayal from Within*, BRATTLEBORO REFORMER (May 3, 2013, 3:00 AM), http://www.reformer.com/ci_23161831/rape-and-u-s-military-betrayal-from-within.

⁷⁷ Kate Taylor, *The Military’s ‘Invisible War’: A Call to Action to Stop Sexual Assaults*, FORBES (June 21, 2012, 4:47 PM), <http://www.forbes.com/sites/katetaylor/2012/06/21/the-militarys-invisible-war-a-call-to-action-to-stop-sexual-assaults/>.

investigated for false accusations. Not one sexual perpetrator faced any punishment.⁷⁸ This is partially attributable to the fact that the military criminal justice system is “worlds apart” from the civilian world due to the fact that decisions regarding the investigation and prosecution of allegations are made within the chain of command—not by an adversarial outside agency—leaving commanders with an inherent conflict of interest. On the one hand, commanders are responsible for seeking justice for crimes; on the other, they are bound as leaders to protect the soldiers and sailors they value and to maintain good morale in their units.⁷⁹ “This can be difficult when an allegation involves an otherwise valuable or likeable serviceman.”⁸⁰

Other peer-driven dynamics are also at play within a tightly confined military environment, such as fears of looking weak, cowardly, or disloyal, or of being ostracized and becoming the object of gossip, thereby further functioning as censors and constraints on soldiers who might otherwise report sexual assault.⁸¹ For example, Patricia Hynes recounts:

[I]n a 2011 interview on National Public Radio, Panayiota Bertzikis, a Coast Guard veteran and founder of the Military Rape Crisis Center in Cambridge, Massachusetts, described the retaliation against victims for reporting sexual assault. She was raped by a fellow Coast Guard member, given no medical services, made to continue working with her rapist, and ultimately discharged from the Coast Guard as unfit for duty. The source of her “unfitness for duty” was the trauma she suffered from both the assault and her futile attempts to seek justice from a stonewalling commander who told her to “shut up and leave his office.” Bertzikis was one of seventeen plaintiffs in a class-action suit filed February 15, 2011, in Federal District Court in Virginia, against former Secretary of Defense Donald Rumsfeld and then-Defense Secretary Robert Gates, charging them with failing to protect service members from repeated rape and sexual assault in the military and failure to investigate complaints or prosecute and punish perpetrators.⁸²

⁷⁸ *Id.*; see also Joe Nocera, *This War Is No Longer Invisible*, N.Y. TIMES (Feb. 22, 2013), <http://www.nytimes.com/2013/02/23/opinion/this-war-is-no-longer-invisible.html>; Quil Lawrence & Marisa Peñaloza, *Sexual Violence Victims Say Military Justice System is 'Broken'*, NPR (Mar. 21, 2013), <http://www.npr.org/2013/03/21/174840895/sexual-violence-victims-say-military-justice-system-is-broken> (“I’ve never met one victim who was able to report the crime and still retain their military career . . . Not one.”).

⁷⁹ Tessier, *supra* note 61.

⁸⁰ *Id.*

⁸¹ Hynes, *supra* note 27.

⁸² *Id.*

In response to these recent, alarming trends, the military has embarked upon a second major era of reforms. The DoD created a new statutory scheme for sexual misconduct⁸³ and revised the UCMJ's Sexual Assault Article 120 provision twice, once in 2007⁸⁴ and again in 2012.⁸⁵ Congress also mandated that a Response Systems to Adult Sexual Assault Crimes Panel—a nine-member body of four individuals selected by members of Congress and five by Defense Secretary Chuck Hagel—conduct a detailed review of factors surrounding sexual assault cases in the military.⁸⁶ Hagel issued guidance on mandatory recertification and retraining for recruiters and sexual assault responders across the force,⁸⁷ and ordered all unit First Sergeants⁸⁸ to inspect work areas for any evidence of lewd or inappropriate materials.⁸⁹ Meanwhile, Secretary of the Army John McHugh issued a November 8th, 2013 directive to initiate discharge proceedings for all convicted sex offenders in the service, though guidance for the implementation of this plan remains forthcoming.⁹⁰ In addition, Senator Kirsten Gillibrand recently proposed a bill to strip military commanders of their ability to prosecute serious crimes and instead hand those decisions over to prosecutors outside the chain of command. When met with skepticism, “[s]he accused critics . . . of oversimplifying the problem and trusting a military system that has consistently failed to address sexual assault and harassment in the past.”⁹¹ Senate Armed Services Committee members, including

⁸³ Major Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put it Back on Target*, 411 ARMY LAW. 1, 1, 3 (2007) (“The new law approaches rape and sexual assault as a crime of violence, placing a requirement for force at the center of the offense.”).

⁸⁴ Brigadier General (Ret.) Jack Nevin & Lieutenant Joshua R. Lorenz, *Neither a Model of Clarity Nor a Model Statute: An Analysis of the History, Challenges, and Suggested Changes to the “New” Article 120*, 67 A.F.L. REV. 269, 279 (2011).

⁸⁵ Capt. Lindsay L. Rodman, *Fostering Constructive Dialogue on Military Sexual Assault*, 69 JOINT FORCE QUARTERLY 25, 30 (Spring 2013), <http://www.ndu.edu/press/military-sexual-assault.html> (last visited Apr. 28, 2013); see also Jim Clark, *2012 Emerging Issues 6423, Professor Jim Clark on 2012 UCMJ Article 120, effective 28 June 2012*, LEXISNEXIS (June 15, 2012), available at [https://www.jagcnet.army.mil/852577C1004877F2/0/CD7859AC835EC94A85257A2B004F57D4/\\$file/2012_Emerging_Issues_6423__Clark_on_2012_UCMJ_Article_120.pdf](https://www.jagcnet.army.mil/852577C1004877F2/0/CD7859AC835EC94A85257A2B004F57D4/$file/2012_Emerging_Issues_6423__Clark_on_2012_UCMJ_Article_120.pdf).

⁸⁶ See Parrish, *supra* note 21, at A1.

⁸⁷ *Id.* at A3.

⁸⁸ A First Sergeant is the highest-ranking non-commissioned officer in any unit smaller than a battalion. He or she is responsible for enforcing standards and maintaining discipline within the ranks.

⁸⁹ Based on author's personal knowledge as a legal intern with Combined Joint Interagency Task Force 435 from May 2013 though August 2013.

⁹⁰ Antonietta Rico, *Army to Discharge Convicted Sex Offenders*, ARMY TIMES (Nov. 20, 2013), <http://www.armytimes.com/article/20131120/NEWS/311200024/Army-discharge-convicted-sex-offenders> (noting that this directive is part of the military's overall campaign against sexual assault).

⁹¹ Leo Shane III, *Lawmakers: Sex Assault Cases Best Kept in Chain of Command*, STARS AND STRIPES (July 25, 2013), <http://www.stripes.com/news/lawmakers-sexual-assault-cases-best->

Chairman Carl Levin, disagree with her approach and have instead called for “a better appeal process when commanders fail to pursue a court-martial,” including an “automatic review by the civilian service secretaries of cases in which commanders ignored legal recommendations for court-martial on serious crimes.”⁹²

Both current and proposed measures, however, continue to fall short of the need for drastic reform and an extreme shift in culture. Recently, an investigation revealed that fifty-nine military recruits were abused by Lackland Air Force Base drill instructors in San Antonio, Texas, prompting the U.S. House of Representatives to hold a widely publicized hearing on the matter.⁹³ The hearing began within days of the DoD’s announcement of the lifting of the combat ban. Thus,

[t]he irony is that while [the Department of] Defense is ready to allow women to serve in combat roles, the Air Force (and probably other branches of the military) is still struggling with how to protect the women and men in its ranks from sexual assault by their peers and commanders during basic training. Rape and sexual assault should not be “incidental” to military service.⁹⁴

To further complicate matters, efforts at hardline reform have, in some instances, backfired and added unnecessary hurdles to the prosecution of sexual assaults within the military. Most notably, President Obama recently told reporters that:

[s]ervice members engaged in wrongful sexual activities must be ‘prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period.’ [The President’s] specific call for dishonorable discharges—one of the multiple options a jury considers during sentencing—could be interpreted as a commander in chief’s

kept-in-chain-of-command-1.232218; see also Karen McVeigh, *Senator Kirsten Gillibrand Gains Support for Army Sexual Assault Reform*, THE GUARDIAN (Sept. 24, 2013), <http://www.theguardian.com/world/2013/sep/24/generals-kirsten-gillibrand-army-sexual-assault>.

⁹² *Id.*

⁹³ Portero, *supra* note 3.

⁹⁴ Michelle Bernard, *With Women in Combat, Will Military Finally Address Epidemic of Sexual Assault?*, WASH. POST (Jan. 24, 2013, 11:38 AM), <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/01/24/with-woman-in-combat-will-military-finally-address-epidemic-of-sexual-assault/>; see also Associated Press, *2 ex-Navy football players to face court-martial in sex assault Case*, FOX NEWS (Oct. 10, 2013), <http://www.foxnews.com/us/2013/10/10/2-navy-football-players-to-face-court-martial-in-sex-assault-case/> (describing a recent scandal at the Naval Academy in which a women learned through friends and social media that three Navy football players were claiming to have all had sex with her while she was intoxicated and blacked out).

orders, potentially compromising the military justice system's legal obligation to arrive at a sentence based on the facts of the case.⁹⁵

As a result, "military judges could face" a significant struggle "throughout the rest of Obama's presidency as they aim to preserve the rights of accusers while shielding the rights of the accused from unlawful command influence."⁹⁶

The following two scenarios are based largely on the facts of actual cases and reflect many of the current challenges DoD officials and lawmakers face in attempting to effectuate meaningful change in the context of a culture that remains ripe for continued sexual violence.

B. A Typical Sexual Assault Scenario: The Barracks Room

On a Friday night after a long week of work, Seaman ARM ventured out on the town with some friends and consumed a substantial number of alcoholic beverages at several different locations, including two clubs. Her impaired speech and glassy eyes indicated that she had become quite intoxicated by the time she fell onto a table, and she required the assistance of several friends to regain her balance. Torpedoman's Mate Second Class Savala was also out with a friend at the same club and observed ARM stumble onto the table. Savala first met ARM the previous week at the same club when he spoke to her briefly on the dance floor.

Eventually, ARM and her friends left the club and went to a nearby karaoke bar. Afterward, they hailed a taxi to return to the Navy base. As she approached the door to her barracks room at about 4:30 AM, ARM stumbled and again required the assistance of her friends. She had no recollection of returning to her room or getting into bed. In fact, she remembered very little at all after leaving the second club.

Thirty minutes later at approximately 5:00 AM, Savala and his friend returned to the barracks area and discussed ARM at length. At the end of the discussion, Savala suggested that they visit her room. Savala was left with the impression that Seaman ARM might be willing to have sexual intercourse and figured he would take his chances. His friend, who knew where ARM lived, led Savala to her room. His friend remained in a nearby common area while Savala knocked on the door.

ARM's next recollection from that night involved lying on her back in her bed and staring at the chest of a person raping her. She did not recognize the man and could tell only that he had tanned or darker skin. After her initial confusion upon waking, she said "no," and tried to push the man away. Following another period of hazy confusion, she next awoke in the shower with the water running. After

⁹⁵ Erik Slavin, *Military judge reduces challenges to jury in sex assault case*, STARS AND STRIPES (July 25, 2013) <http://www.stripes.com/news/pacific/military-judge-reduces-challenges-to-jury-in-sex-assault-case-1.232097>.

⁹⁶ *Id.*

showering, she returned to her bed and slept until 2:30 PM the following afternoon. Seaman ARM then went to an emergency room, where she received medical treatment. She did not report the incident as a rape at that time. On the following day, after speaking with a fellow airman and her mother, she returned to the hospital and reported the incident as a rape. At that point, she received a full Sexual Assault and Rape Test [SART]. She also provided authorities with her bedding and a hat she had found in her room. Subsequent forensic analysis connected DNA from the bedding to Savala. In addition, investigators determined that the door to Seaman ARM's room did not lock properly as a result of a broken locking mechanism.⁹⁷

Savala was initially convicted of rape, but the lower court's decision was later overturned by the Court of Appeals for the Armed Forces based on an evidentiary technicality.⁹⁸

C. A Typical Sexual Assault Scenario: The Deployed Environment

Egregious sexual violations do not always entail physical assault. During her deployment to Afghanistan from 2002 to 2003, former Specialist Karlene E. HemerlyFluck-Kroll visited the latrine late one night, and, after undressing, glanced at the floor and saw a camera under the stall. Another soldier, a sergeant, was hiding in another stall, masturbating to the images. HemerlyFluck-Kroll tackled the voyeur, screaming for help, but no one came. She had been inside the latrine for so long that the friend who escorted her there assumed she must have left on her own and went to check her room. Another soldier heard the commotion but assumed it was a "catfight" between two women.

The sergeant escaped, but when HemerlyFluck-Kroll was at the military police station, she learned that he had a record. He had done the same thing to another female soldier three months earlier; however, he had escaped unscathed when she dropped the charges, and the sergeant's company commander covered up the incident. That night was followed by two weeks of terror as the military police and various other service members looked for the sergeant. It was not until a female lieutenant colonel from the Judge Advocate General's Corps [JAGC] heard about the voyeurism that anything actually happened. The sergeant was arrested and was on a plane back to the States within hours. Ultimately, he was sentenced to only five months in prison, though some might consider this among the "better" outcomes to result from a service member-on-service member sexual misconduct case.⁹⁹

⁹⁷ Excerpted from *United States v. Savala*, 70 M.J. 70 (C.A.A.F. 2010).

⁹⁸ Michelle Lindo McCluer, *CAAF Reverses Rape Conviction*, NAT'L INST. OF MIL. JUST. (May 19, 2011, 12:26 PM), <http://www.nimjblog.org/2011/05/caaf-reverses-rape-conviction.html>.

⁹⁹ Excerpted from Elizabeth M. Collins, *Surviving sexual assault*, U.S. ARMY. MIL. (Aug. 27, 2010), <http://www.army.mil/article/44333>.

III. NATURE OF THE INCLUSION POLICY

In context of the ongoing sexual assault crisis, the DoD has offered another potential solution: integrate all branches of the military to prevent gender discrimination and place all service members on a equal playing field.¹⁰⁰ The recent policy change, instituted by former Secretary of Defense Leon Panetta will, theoretically, “open hundreds of thousands of front-line positions and potentially elite “commando” jobs to women.”¹⁰¹ The announcement overturns a 1994 rule banning women from being assigned to smaller ground combat units.¹⁰² In response to input from the Chairman of the Joint Chiefs of Staff, Panetta’s decision gives the military services until January 2016 to seek special exceptions if they believe any positions must remain closed to women.¹⁰³ In justifying his decision, Panetta argued that women, who already make up approximately fifteen percent of the force, have increasingly found themselves in the “reality of combat”; thus, although not everyone can meet the qualifications to be a combat soldier, everyone is entitled to the opportunity.¹⁰⁴

Before the lifting of the ban became official, many academics surmised that the status quo was ripe for change. For example, just months before the change in policy was announced, author Angela Rollins predicted that the recent elimination of Don’t Ask, Don’t Tell would pave the way for women who wished to serve in combat roles: “[T]he basis of excluding women from combat and other areas of the military is inconsistent with both current gender jurisprudence and recent developments in allowing homosexuals to openly serve in the military.”¹⁰⁵

¹⁰⁰ See, e.g., Luis Martinez, *Services to Reveal Plans to Integrate Women in Combat*, ABC NEWS (June 18, 2013), <http://abcnews.go.com/Politics/plans-integrate-women-combat-begin/story?id=19426765>; see also Chris Carroll, *Supporters, critics open fire on women in combat*, STARS AND STRIPES (June 19, 2013), <http://www.stripes.com/news/supporters-critics-open-fire-on-women-in-combat-1.226563>.

¹⁰¹ Justin Fishel, *Military leaders lift ban on women in combat roles*, Fox News (Jan. 24, 2013), <http://www.foxnews.com/politics/2013/01/24/panetta-opens-combat-roles-to-women/FoxNews>; see also Martinez, *supra* note 100.

¹⁰² Fishel, *supra* note 101; see also Dunn, *supra* note 16, at 18 (“As a matter of DoD policy promulgated by Secretary of Defense Les Aspin in 1994, women are currently restricted ‘from assignments to units below the brigade level whose primary mission is to engage in direct combat on the ground.’ Direct ground combat is defined as engaging the enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force’s personnel.”).

¹⁰³ See Memorandum from Lieutenant General Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, U.S. Army, to Secretary of Defense, subject: Women in the Service Implementation Plan (Jan. 9, 2013) (memorandum available at <http://online.wsj.com/public/resources/documents/DempseyLetter.pdf>) (“If we find that the assignment of women is in conflict with our stated principles, we will request an exception to policy.”).

¹⁰⁴ Fishel, *supra* note 101.

¹⁰⁵ Rollins, *supra* note 11, at 382.

According to Rollins, the military's prior exclusionary policy was "in conflict with current legal holdings"¹⁰⁶ and had "a harmful impact by reinforcing the perception of inferiority of women in society."¹⁰⁷

Notably, however, the push for equality is not being spearheaded by female service members, neither enlisted nor officer. As one female Marine points out, she is "not personally hearing female Marines . . . pounding on the doors of Congress claiming that their inability to serve in the infantry violates their right to equality."¹⁰⁸ The issue is, rather, being promulgated by several groups, one of which is a small committee of civilians appointed by the Secretary of Defense called the Defense Advisory Committee on Women in the Service [DACOWITS].¹⁰⁹ Their mission is to advise the DoD on matters of policy pertaining to the wellbeing of women in the military, from recruiting to employment. Members are selected based on their prior military experience or experience with women's workforce issues. Surprisingly, "none of the committee members are on active duty or have any recent combat or relevant operational experience related to the issue they are attempting to change."¹¹⁰ Their decisions and initiatives, however, will profoundly affect the lives of current active duty service members for years to come.

A. *Physical Standards*

Critics have raised several issues as a result of the DoD's recent decision to implement the inclusion policy.¹¹¹ One is the question of uniform physical standards. Critics fear women's bodies simply are not capable of performing the physical tasks required of them in the context of combat.¹¹² On the other hand,

¹⁰⁶ See, e.g., *United States v. Virginia*, 518 U.S. 515, 519 (1996); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003).

¹⁰⁷ Rollins, *supra* note 11, at 382.

¹⁰⁸ Capt. Katie Petronio, *Get Over it! We Are Not All Created Equal*, THE MARINE CORPS GAZETTE, <http://www.mca-marines.org/gazette/article/get-over-it-we-are-not-all-created-equal> (last visited Apr. 28, 2013).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Lerman, *supra* note 6, at 1. (Representative Joe Heck: "I don't envy you . . . As you know, there's not universal acceptance of this concept.").

¹¹² Jim Miklaszewski & Courtney Kube, *Defense chief Panetta to clear women for combat roles*, NBC NEWS (Jan. 15, 2013, 5:00 AM), http://usnews.nbcnews.com/_news/2013/01/23/16664507-defense-chief-panetta-to-clear-women-for-combat-roles?lite (Penny Nance, President and CEO of Concerned Women for America Legislative Action Committee, a conservative lobbying group, was quoted as stating that, "[t]he point of the military is to protect our country. . . . Our military cannot continue to choose social experimentation and political correctness over combat readiness."); see also Patrick J. Buchanan, *Do We Need Women in Combat?*, THE AMERICAN CONSERVATIVE (June 25, 2013, 5:02 AM), <http://www.theamericanconservative.com/articles/do-we-need-women-in-combat/> ("Sending women into combat on equal terms seems also to violate common sense. When they reach maturity, men are bigger, stronger, more aggressive.").

proponents of the new policy, like Maia Goodell, a former Surface Officer in the U.S. Navy, are quick to note that:

[a]nalyzing the physical-strength rationale for de jure exclusion of women from combat exposes the distorted lens demanding that men be strong and women be weak. This distorted lens compromises the military mission on many levels. It leads to excluding available personnel who not only would be capable of doing the job, but also might do it better.¹¹³

Furthermore, according to General Robert W. Cone, “[w]omen do not want standards changed for them If a standard is valid, they want to be able to meet that standard.”¹¹⁴ Accordingly, implementing the policy will require what officials describe as “a methodical review of the physical standards needed for each combat job to determine how best to measure fitness and whether some positions will need to remain restricted to men.”¹¹⁵ Juliet Beyler, the DoD’s director of officer and enlisted personnel development, emphasizes that “[i]t’s not a matter of lowering or raising standards. The key is to validate the standard to make sure it’s the right standard for the occupation.”¹¹⁶

The reality, however, is that there is no clear plan for how to evaluate physical performance across the sexes. The Marines currently have separate gender-specific boot camps, in part based on the rationale that men and women “need to be nurtured different[ly] They just need different steps as they go. They get to the same place. They’re Marines.”¹¹⁷ This is the essence of the problem presented by broad integration because mutual respect in the military is built upon commonality in experiences, and if Marines are not experiencing entry-level training together in a shared environment of adversity, that respect will not exist. When the Marine Corps’ Infantry Officer Course, a grueling three-month regimen that many men fail, was first opened to women in September of 2012, only two out

¹¹³ Maia Goodell, *Physical-Strength Rationales for De Jure Exclusion of Women from Military Combat Positions*, 34 SEATTLE U. L. REV. 17, 50 (2010).

¹¹⁴ Ernesto Londoño, *Pentagon to Move ‘Expediently’ to Lift Ban on Women in Combat Roles*, WASH. POST (Jan. 24, 2013), http://www.washingtonpost.com/world/national-security/pentagon-to-move-expeditiously-to-lift-ban-on-women-in-combat-roles/2013/01/24/f9fd6244-665d-11e2-85f5-a8a9228e55e7_story.html; see also Lerman, *supra* note 6 (“‘We’re not going to lower standards,’ said Juliet Beyler, the Defense Department’s director of officer and enlisted personnel management.”).

¹¹⁵ Lerman, *supra* note 6.

¹¹⁶ *Id.* (Army Lieutenant General Howard Bromberg, deputy chief of staff for Army personnel, stated that the use of valid, equal standards for men and women should make clear the fairness of job qualifications: “We’re going to eliminate males in some cases . . . A standard’s a standard.”).

¹¹⁷ *Id.*

of eighty eligible women volunteered and neither completed it.¹¹⁸ A Marine Corps study revealed that thirty-one percent of females surveyed would be interested in combat positions, but, as one former Marine points out, “[t]he infantry is not for everyone, male or female. I suspect that only a small fraction of women will even attempt to join. But for those who do, I can only hope that I am proven wrong, and that they succeed.”¹¹⁹ Recently, four female Marines proved the naysayers wrong when they “completed a grueling twenty-kilometer hike during enlisted infantry training . . . a key benchmark at the course designed to train Marines in small unit tactics, physical endurance, and weaponry.”¹²⁰ However, given that seven females started the hike, their fifty-seven percent passage rate does not even begin to compare to that of their male counterparts; only twenty-six out of 246 males did not complete the hike, a passage rate of eighty-nine percent.¹²¹

Meanwhile, “[t]he Army is evaluating the way it screens soldiers for physically demanding jobs, drawing lessons from a pilot program in which 286 women were admitted into positions previously reserved for men.”¹²² As of now, there appears to be no definitive plan for the way ahead. Even after years of trials, the Army has been unable to settle on a new version of the Army Physical Fitness Test that is administered to *all* soldiers, let alone a specialized test that will evaluate a woman’s readiness for combat.¹²³ Without this form of validation, female soldiers will face an uphill battle, because proving oneself physically in the military is often the first step to gaining the respect of one’s peers. Panetta claims that the DoD’s primary purpose “is to ensure that the mission is carried out by the best qualified and the most capable service members, regardless of gender and regardless of creed and beliefs.”¹²⁴ He stresses the fact that he does not advocate lowering standards for certain combat positions, but offers little guidance for how the change will ultimately be effectuated.¹²⁵ Perhaps this guidance is still forthcoming. Given that commanders have until 2016 to advocate for exceptions

¹¹⁸ *Id.*; see also Julian E. Barnes & Dion Nissenbaum, *Combat Ban for Women to End*, WALL ST. J. (Jan. 24, 2013), <http://online.wsj.com/article/SB10001424127887323539804578260123802564276.html>.

¹¹⁹ Schultz, *supra* note 71 at 5.

¹²⁰ Jim Michaels, *Women Pass Key Benchmark at Infantry Training*, USA TODAY (Oct. 29, 2013), <http://www.usatoday.com/story/nation/2013/10/29/marines-infantry-women-combat/3306181/>

¹²¹ *Id.*; see also Hope Hodge Seck, *First Female Marines to Graduate Infantry Training: ‘It Takes Everything You Got’*, Army Times (Nov. 21, 2013, 6:00 AM), <http://www.armytimes.com/article/20131121/NEWS/311210014/First-female-Marines-graduate-infantry-training-takes-everything-you-got-> (describing how, despite the ground-breaking success of three female Marines in ultimately completing the fifty-nine day course, these women will not be assigned to infantry units, nor earn an infantry occupational specialty but, rather, will report to non-infantry schools for further training).

¹²² Londoño, *supra* note 114.

¹²³ Brock Vergakis, *Army not changing physical fitness test—for now*, HUFFINGTON POST (Aug. 31, 2012), <http://www.huffingtonpost.com/huff-wires/20120831/us-army-physical-fitness/>.

¹²⁴ Gaskell & Brannen, *supra* note 4.

¹²⁵ *Id.*

to the policy, it is possible that some will focus their energy on this task, rather than implementing a policy that many continue to oppose.¹²⁶ Although officials from all military services told Congress in July of 2013 that they can open combat positions to women by 2016 “without lowering physical or performance standards,” the methodology for making good on this promise remains to be seen.¹²⁷ Because the phrase “gender-neutral standards” has yet to be defined, critics argue “all possible options for implementing ‘gender-neutral standards’ would have the effect of lowering requirements.”¹²⁸

B. Exceptions to Implementation

In reality, the recent change in policy is far less revolutionary than it may look at face value. Lifting the combat ban is a mere nod to the reality of the last decade of war; there are no traditional “front lines,” and women are just as likely as men to be traveling on a road in a truck that an insurgent targets with an Improvised Explosive Device [IED].¹²⁹ “Anne G. Hargreaves, who served as an Army nurse in Europe during World War II, noted that women have served on the battlefield for decades, even if they were not officially classified as combat personnel.”¹³⁰ Similarly, Army Staff Sgt. Jennifer Hunt, who was injured in 2007 by a roadside bomb in Iraq, called the previous ban on women in combat “a legal fiction.” She said women have long faced the same front-line dangers from militants and IEDs as men: “Right before the IED went off, it didn’t ask me how many push-ups or sit-ups I could do Right now the women who are serving are being engaged in combat, so their physical restrictions aren’t a barrier.”¹³¹ The general public seems somewhat confused about exactly how involved women have been in recent military operations in Iraq and Afghanistan. One Pennsylvania resident stated that, “[w]omen have always been involved in combat somehow, whether it would be taking care of soldiers during World War II or the Revolutionary War; they just

¹²⁶ *Id.*

¹²⁷ Lerman, *supra* note 6, at 1.

¹²⁸ Bob Unruh, Poll: *Americans Approve of Drafting Women for Combat*, WND (June 20 2013, 11:39 PM), <http://www.wnd.com/2013/06/poll-americans-approve-of-drafting-women-for-combat/>.

¹²⁹ See Dietz, *supra* note 12, at 153 (“No longer is a soldier’s value measured by how close he or she is to the front line—there are no front lines on today’s battlefield.”) (citation omitted); see also ROSEMARIE SKAINE, *WOMEN IN COMBAT: A REFERENCE HANDBOOK* 64 (2011) (“The military is gender blind in a war zone.”); see also KIRSTEN HOLMSTEDT, *BAND OF SISTERS: AMERICAN WOMEN AT WAR IN IRAQ* 313 (2007) (“Women can’t fight on the front line?” DeCaprio asks disbelievingly. ‘Is being the .50-cal gunner of the first scout vehicle of a security element of a convoy or security patrol considered front line?’”).

¹³⁰ Travis Anderson, *Local veterans respond to women in combat decision*, BOS. GLOBE (Jan. 24, 2013), <http://www.bostonglobe.com/metro/2013/01/24/local-veterans-respond-women-combat-decision/UEw0BmWH9m3U77EBEs3HgN/story.html>.

¹³¹ Barnes & Nissenbaum, *supra* note 118.

haven't done the hand to hand fighting."¹³² Sergeant Hester, the first female recipient of the Silver Star since World War II for her actions during a firefight with enemy combatants, might beg to differ. Most notably, in the same breath she called the decision "historic," Senator Patty Murray of Washington stated that "it's important to remember that in recent wars that lacked any true front lines, thousands of women already spent their days in combat situations serving side-by-side with their fellow male service members."¹³³

Despite its less-than-revolutionary status, the inclusion policy itself is still riddled with loopholes that allow commanders to make the case for exceptions by the year 2016, thereby removing some of the teeth from the policy itself.¹³⁴ The Pentagon has essentially left itself with enough wiggle room to allow some jobs to remain closed to women. As one senior defense official explains, when a branch finds that "a specific job or unit should not be open, they can go back to the secretary and ask for an exemption to the policy, to designate the job or unit as closed."¹³⁵ In other words, there is little to no guarantee that women will be permitted to join the Navy's elite Seal Team Six anytime soon¹³⁶; exceptions will likely remain for elite Special Operations positions in Navy SEALs, Army Rangers, and Delta Force.¹³⁷ In a much overlooked moment of transparency, Panetta made clear that the goal is for equality of opportunity, not necessarily of outcomes; as a result it is "entirely possible that some high-profile units from which women are excluded today will continue to exclude them after the 2016 deadline for the policy change to take effect."¹³⁸ This is another way of acknowledging that although the policy sounds progressive on its face, it provides department officials with a backdoor "out" that may permit some commanders to continue to exclude women from their ranks.

Thus, although the long-term success of removing the ban will depend in part on the successful implementation of Panetta's new policy,¹³⁹ there appears to be no emergent plan or structure in place to effectuate this implementation. Kingsley Browne, a professor at Wayne State University Law School and author of *Co-ed Combat: The New Evidence That Women Shouldn't Fight the Nation's Wars*, "calls the decision misguided. The fact that the decision precedes the assessment

¹³² Gary Puleo, *Local Veterans Respond to Women in Combat Issue*, TIMES HERALD (Jan. 27, 2013), <http://www.timesherald.com/article/20130127/NEWS01/130129616/local-veterans-respond-to-women-in-combat-issue>.

¹³³ Miklaszewski & Kube, *supra* note 112.

¹³⁴ Lawrence, *supra* note 7.

¹³⁵ *Id.*

¹³⁶ Gaskell & Brannen, *supra* note 4.

¹³⁷ Miklaszewski & Kube, *supra* note 112.

¹³⁸ Gaskell & Brannen, *supra* note 4.

¹³⁹ Schultz, *supra* note 71.

phase is putting the cart before horse.”¹⁴⁰ Panetta has since transitioned out of his current role as Secretary of Defense, leaving his successor, Chuck Hagel, with what will undoubtedly prove to be an uphill battle¹⁴¹: a new and highly criticized policy to enforce, arbitrary deadlines to meet, and the possibility of exceptions that may ultimately swallow the new rule.

C. A Gender-Neutral Draft

Another issue is the mandatory draft, were it to ever be reinstated during wartime.¹⁴² Even before the recent policy change was enacted, a small minority favored extending Selective Service registration requirements to women. According to Major Scott E. Dunn, a U.S. Army Judge Advocate, “[t]he time has come for Congress to reconsider its narrow view of the draft as a means only of augmenting troop strength.”¹⁴³ The purpose of the Military Selective Service Act [MSSA] is to augment troop strength in times of war, a need that could just as easily be met by incorporating eligible women into additional combat support and combat service support roles.¹⁴⁴ Since the “American ethic is essentially egalitarian,”¹⁴⁵ the government’s system of conscription should follow suit: “The evolution of our conscription laws toward greater inclusion and the fairest possible allocation of duties and responsibilities demands the inclusion of women.”¹⁴⁶

Unified support for the inclusion of women in the draft, however, is far from the current state of affairs.¹⁴⁷ Anne Coughlin, a law professor at the University of Virginia School of Law, confirms that overturning the combat exclusion for women implies, both logically and legally, that “the male-only draft falls as well.”¹⁴⁸ Critics are concerned that the prospect of women being drafted might

¹⁴⁰ Jenna Goudreau, *Will Allowing Women in Combat Roles Revolutionize Military Leadership?*, FORBES (Jan. 23, 2013), <http://www.forbes.com/sites/jennagoudreau/2013/01/23/will-allowing-women-in-combat-roles-revolutionize-military-leadership/>.

¹⁴¹ See, e.g., *id.*

¹⁴² Barnini Chakraborty, *Decision to Allow Women in Combat Role Raises Questions About Draft*, FOX NEWS (Jan. 24, 2013), <http://www.foxnews.com/politics/2013/01/24/decision-to-allow-women-in-combat-roles-raises-questions-about-draft/> (Tommy Sear, executive director at The Center for Military Readiness told FoxNews.com that “he believes once women are allowed on the front lines, all women will be held to the same standards as men,” thereby obligating the government to expand the draft—should it ever be activated—to women); see also Anna Mulrine, *Women in combat: Will they have to register for the draft?*, CHRISTIAN SCIENCE MONITOR (Jan. 23, 2013), <http://www.csmonitor.com/USA/Military/2013/0123/Women-in-combat-Will-they-have-to-register-for-the-draft> (noting that the military discontinued the draft in 1973).

¹⁴³ Dunn, *supra* note 16, at 1.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 21.

¹⁴⁶ *Id.*

¹⁴⁷ Mulrine, *supra* note 142 (“It’s a thorny question, raising what may be a difficult prospect societally.”).

¹⁴⁸ *Id.*

make the country more reluctant to go to war,¹⁴⁹ although the DoD gave this factor little to no weight in deciding to adopt the inclusion policy.¹⁵⁰ A recent telephonic phone survey conducted March 27 through April 1, 2013 found that although the majority of the 1,000 registered voters queried supported the inclusion of women in the draft, thirty-eight percent did not support their inclusion.¹⁵¹ Thus, while asking physically strong and able women to volunteer for combat is already considered somewhat contentious, asking women to potentially subject themselves to combat by virtue of a mandatory draft is, for many Americans, simply a bridge too far.

IV. INCLUSION WILL INCREASE SEXUAL ASSAULTS

Of all the issues associated with integration, the most troubling is the possibility that, instead of placing all service members on an equal playing field, the inclusion policy will result in an increase in sexual assaults within the military's ranks. The 2011 Department of Defense Annual Report of Sexual Assault in the Military turned heads that have continued to remain fixated on the problem as the exposure of ongoing scandals reveals an abundance of sexual assault crimes between service members.¹⁵² As Representative Jackie Wolorski, a member of the House Armed Service's Committee military personnel subcommittee, recently pointed out, integrating women into small ground-combat units risks an increase of sexual assaults in the ranks: "Have you anticipated what's going to happen? . . . What's happening now doesn't work . . . Is there a plan?"¹⁵³

The recent lifting of the combat ban then begs the question: Will lifting the ban on women in combat alleviate or exacerbate the ongoing sexual assault crisis?

Proponents of the change argue that "bringing women into the fold as complete members of the team will break down the perception that they are weaker and will reduce sexual assault and harassment."¹⁵⁴ Lifting gender-based barriers will provide qualified women with the opportunity to assume high-ranking positions in which they can affect military policy, thereby causing a long-term "cultural sea change."¹⁵⁵ In essence, this change ensures that women in service can

¹⁴⁹ *Id.*

¹⁵⁰ See Chakraborty, *supra* note 142 (Panetta stated that the question of draft implications was "not our operation. . . . I don't know who the hell controls Selective Services if you want to know the truth . . . Whoever does, they're going to have to exercise some judgment based on what we just did.").

¹⁵¹ Unruh, *supra* note 128.

¹⁵² O'Toole, *supra* note 29.

¹⁵³ Lerman, *supra* note 6.

¹⁵⁴ Goudreau, *supra* note 140.

¹⁵⁵ *Id.*; see also Lerman, *supra* note 5 (Juliet Beyer, Defense Department's director of officer and enlisted personnel management, says that expanding opportunities for women is part of the

“maximize their potential and limit the brain-drain that comes when they hit the brass ceiling.”¹⁵⁶ Professor Coughlin, who has advised plaintiffs suing the military for integration into combat units, seems relatively confident that this is a step in the right direction: “I don’t mean to say for a minute that this will . . . solve the problem, but in a culture where there’s hierarchy and all of the people that have power over women are men, it creates a culture in which some are going to be inclined to abuse their power.”¹⁵⁷ Rebekah Miller, a former Staff Sergeant for the Army National Guard, echoes Professor Coughlin’s sentiments. She admits that although problems with sexual violence and harassment have a potential to increase with integration, allowing men and women to serve with each other as equals will likely build respect and trust as women prove that they are as capable as men.¹⁵⁸ As author Kirsten Holmstedt emphasizes, “[t]he military no longer differentiates between male and female convoy commanders. When will the American people stop making a distinction?”¹⁵⁹

On the other hand, as more cautious observers point out, the same women who will now be permitted to join the ranks of the nation’s most elite units will also be dealt an increased risk of sexual assault at the hands of their own comrades; “[u]ntil that changes, we cannot begin to tell ourselves that women in our armed forces enjoy anything resembling equality, lifted combat ban or no.”¹⁶⁰ Thus, “[l]ifting the ban on women in combat is a step in the right direction for women’s rights, but we haven’t yet won half the battle.”¹⁶¹ Sexual predation is indefensible, and everything should be done to punish the perpetrators and deter further abuse. There may, however, “be a limit to how much gender-sensitivity training can do to reengineer some brutish but basic human impulses in an institution still at least formally dedicated to a high-testosterone activity, one characterized by extreme and absolute differences of power.”¹⁶² Thus, “the goal of the military’s diversity

Pentagon’s strategy to combat sexual assaults: “The more we treat service members equally, the more likely they are to treat each other with respect.”)

¹⁵⁶ Goudreau, *supra* note 140; see also Lerman *supra* note 6 (Representative Loretta Sanchez: “Combat performance is an important issue when people are looking at moving up in all of these organizations.”).

¹⁵⁷ Anna Mulrine, *Women in Combat Units: Could it Reduce Sexual Assault in the Military?*, CHRISTIAN SCIENCE MONITOR (Jan. 25, 2013), <http://www.csmonitor.com/USA/Military/2013/0125/Women-in-combat-units-Could-it-reduce-sexual-assault-in-the-military>.

¹⁵⁸ Schultz, *supra* note 71.

¹⁵⁹ Holmstedt, *supra* note 129, at 312.

¹⁶⁰ Chloe Angyal, *Women in Combat? OK, But What About the Sexual Assaults?*, MSNBC (Jan. 24, 2013, 4:30 PM), <http://tv.msnbc.com/2013/01/24/women-in-combat-ok-but-what-about-the-sexual-assaults/>.

¹⁶¹ Nina Burleigh, *Time for the Military to Solve Its Rape Problem*, NY OBSERVER (Jan. 29, 2013), <http://observer.com/2013/01/with-women-entering-combat-the-military-needs-to-solve-its-rape-problem/>.

¹⁶² Heather MacDonald, *Women in Combat and Sexual Assault*, NATIONAL REVIEW (Jan. 27, 2013), <http://www.nationalreview.com/corner/338942/women-combat-and-sexual-assault-heather-mac-donald>.

infrastructure—to introduce women into every corner of a formerly predominantly male activity—had better be highly important to war preparedness to justify the cost.”¹⁶³ There may very well have been some wisdom in the historic separation of the sexes in combat beyond the mere physical unfitness of many women for the rigors of combat. As *Feministing* editor Chloe Angyal points out, “an entire culture change will take tremendous work and a lengthy amount of time . . . [I]t’s not just about policy—equality takes more than that.”¹⁶⁴

A. Problem 1: Hyper-Masculinity

According to opponents of the inclusion plan, there are multiple reasons the inclusion policy will simply not work and, if anything, will exacerbate the ongoing sexual assault crisis. One of these is the deep-rooted hyper-masculinity that underlies the military profession. Like it or not, there are inherent power dynamics at play in combat scenarios that will present significant challenges to the implementation of this new policy. Although proponents continue to stress that “[o]ur male troops are highly trained professionals, capable of facing any challenge that comes their way,” asking naysayers not to “shortchange our men” flies in the face of the weight of the evidence.¹⁶⁵ The abuse of women in war illustrates the power dynamics at play in the military’s strict hierarchy; within this hierarchy, “one way to assert dominance is through sexual violence and women are at the bottom of the totem pole.”¹⁶⁶

When women were first integrated into the military’s “hyper-masculine culture” in the 1970s, the fallout included “widespread hostility and harassment of those women who transgress the boundaries of gender.”¹⁶⁷ At that time, sexual harassment was the issue; sexual assault has since taken its place and reflects a dramatic increase in the willingness of fellow service members to push the boundaries beyond previous limits. Because “[t]he integration of women into the highly masculinized military culture fundamentally challenges the constructed identity of the warrior as male and the military as masculine,”¹⁶⁸ the process will

¹⁶³ *Id.*

¹⁶⁴ Faiven Feshazion, *For women in combat, the big threat isn’t behind enemy lines*, MSNBC (Jan. 30, 2013), <http://tv.msnbc.com/2013/01/30/for-women-in-combat-the-big-threat-isnt-behind-enemy-lines/>.

¹⁶⁵ Adrianna Domingos-Lupher, *Women in Combat: Are We Selling Our Male Troops Short?*, NEXTGENMILSPOUSE (Jan. 28, 2013), <http://nextgenmilsponse.com/women-in-combat-are-we-selling-our-male-troops-short/>.

¹⁶⁶ Karen McVeigh, *Sexual assault crisis tempers euphoria over end of combat ban*, THE GUARDIAN (Jan. 28, 2013), <http://www.guardian.co.uk/world/2013/jan/25/sexual-assault-us-military-combat>.

¹⁶⁷ Vojdik, *supra* note 11, at 344.

¹⁶⁸ *Id.* at 343.

not be as simple as some of the proponents of the change predict it will be.¹⁶⁹ It will not be a simple case of selecting those women who can meet the physical standards and allowing them to integrate into male units, but rather, will likely constitute a long and complicated process that may ultimately produce a short-term increase in sexual assaults.

In the words of Colleen Bushnell, a former Staff Sergeant in the U.S. Air Force who was sexually assaulted in 2003 at Lackland Air Force Base,

[t]his is a predator problem, not a female problem That's an abuse of authority, that's a fundamental breakdown in the culture—it's about translating the core values of the military into the actions of leadership This is a serious problem that cannot be fixed with one solution. There will be many solutions, and it may take many years for the culture to transform to where we would like it to be."¹⁷⁰

Thus, the inherent issue, and one that no policy can possibly “fix,” is that the “most commonly employed American gender stereotypes are evident, and often amplified, within the military.”¹⁷¹ The military mindset simply has not caught up with the realities of the time—that many women have performed the same soldiering duties, if not more, than many men in combat. Social conservatives, perhaps the most notable of whom is Phyllis Schlafly,¹⁷² “perceive the military as a male domain that has been invaded by women. It is femininity that highlights these . . . ‘invaders’ status as women and, perhaps more important, their alleged inability to soldier.”¹⁷³ Others have gone so far as to suggest that there are simply certain forms of psychological “distance” that make both killing and sexual assault easier to accept in the context of an organization like that military that trains its people to fight.¹⁷⁴ As a result, “[w]e ought not be surprised that rape takes place during war, because conditions are ripe for rape.”¹⁷⁵

B. Problem 2: Increased Accessibility

¹⁶⁹ Zenko, *supra* note 23 (noting that General Mark Welsh, the Air Force Chief of Staff, recently “attributed the rates of sexual assault in the military in part, to the ‘hookup mentality of junior high,’” a remark for which he later apologized).

¹⁷⁰ Mulrine, *supra* note 157.

¹⁷¹ Schultz, *supra* note 71.

¹⁷² See Todd Beamon, *Phyllis Schlafly: Women on Front Lines ‘An Embarrassment to the Country’*, NEWSMAX (Jan. 23, 2013), <http://www.newsmax.com/Headline/women-combat-front-lines/2013/01/23/id472683>.

¹⁷³ MELISSA S. HERBERT, CAMOUFLAGE ISN’T ONLY FOR COMBAT: GENDER, SEXUALITY, AND WOMEN IN THE MILITARY 77 (1998).

¹⁷⁴ DR. MIC HUNTER, HONOR BETRAYED: SEXUAL ABUSE IN AMERICA’S MILITARY 20–21 (2007).

¹⁷⁵ *Id.* at 21.

Although the inclusion policy is lauded for opening “thousands” of positions to women,¹⁷⁶ this change is precisely what will lead to an increase in sexual assaults. With 237,000 positions closed to women before the lifting of the ban, reported sexual assaults were already at an all-time high.¹⁷⁷ The psychology and cultural nuances underlying this trend are unlikely to change with sudden forced integration; in fact, it will simply make women more accessible to men in situations where stress is high and trust is essential. This may in part be based on the hesitation many males have expressed regarding integration. In interviewing a number of Marines, Thomas Brennan, a former Marine Sergeant, found that soldiers were often concerned they would react differently on the battlefield to the same situation involving a female comrade than a male one. Many men worry they might feel an obligation to protect a female comrade, which could hurt the unit on the front lines: “Integrating women into the infantry is asking to shift a cultural norm. It is not something that is impossible, but it will take much effort and training to be successful.”¹⁷⁸ Furthermore, even if these stereotypes do not necessarily emerge from a desire to subjugate women, “they are premised on another commonly held belief with even darker implications: that women are the weaker sex.”¹⁷⁹ Forcefully integrating a large number of the “weaker sex” into an environment wrought with high tension and stress represents a potential recipe for disaster. Last February, Panetta ordered U.S. military service chiefs to find ways to expand the role of females in combat, which resulted in approximately 14,300 new positions being opened up to women.¹⁸⁰ Sexual assaults since that time, however, have continued to remain on the rise.¹⁸¹ There is no telling how that

¹⁷⁶ W.W., *See Jane shoot*, ECONOMIST (Jan. 25, 2013), <http://www.economist.com/blogs/democracyinamerica/2013/01/women-combat> (explaining that 237,000 combat positions, or approximately one fifth of all assignments will now, in theory, be open to women).

¹⁷⁷ Lerman, *supra* note 6.

¹⁷⁸ Schultz, *supra* note 71.

¹⁷⁹ *Id.*

¹⁸⁰ Barnes & Nissenbaum, *supra* note 118.

¹⁸¹ Molly O'Toole, *Military Sexual Assaults Spike Despite Efforts to Combat Epidemic*, HUFFINGTON POST (May 7, 2013), http://www.huffingtonpost.com/2013/05/07/military-sexual-assaults-2012_n_3230248.html (“Reports of sexual assault in the military rose during October 2011 through September 2012 by 6 percent from the prior year.”); *see also* Eyder Peralta, *Sexual Assaults In Military Have Increased By A Third Since 2010*, NPR (May 7, 2013), <http://www.npr.org/blogs/thetwo-way/2013/05/07/181897437/sexual-assaults-in-military-have-increased-by-a-third-since-2010> (“[I]n 2010, 19,300 service members were believed to be victims of sexual assault; that number went up to 26,000 in 2012.”); Zenko, *supra* note 23 (“The 2012 Workplace and Gender Relations Survey of Active Duty Members (WGRA) found that an estimated 26,000 active-duty servicemembers [sic] were sexually assaulted last year, and recent allegations of sexual assault by officers assigned to prevent that very crime have lent the situation a sinister irony.”).

It should be noted here that these recent statistics are highly controversial; some might argue that the term “sexual assault” is used overly broadly to encompass behavior that, while inappropriate or discouraged, does not amount to “assault.” *See* Zenko, *supra* note 23 (“The WGRA defines

number might continue to increase, particularly on isolated, forward-deployed bases where fully integrated units will struggle with the challenges of cohabitation and shared facilities.

Studies on this issue vary considerably: Proponents of the policy argue that studies have shown that a mix of genders does not affect unit cohesion. Rather than gender, “it is the commonality of experience of the soldiers involved . . . that produces cohesion . . . [I]t is the discriminatory *exclusion of women* that is more likely to affect unit cohesion.”¹⁸² Cohesion, however, does not provide an effective deterrent against sexual assault, as the last decade has demonstrated. In fact, greater cohesion and integration are exactly what lead to an increase in assaults. Kingsley R. Browne “opines that sexual assaults are the predictable consequence of ‘mixing the sexes together in the often intimate and cloistered environments in which military personnel operate.’”¹⁸³ The stories and commentaries about “Forward Operating Base [FOB] Queens”¹⁸⁴ are already

‘unwanted sexual contact’ as ‘completed or attempted sexual intercourse, sodomy (oral or anal sex), penetration by an object, and the unwanted touching of genitalia and other sexually related areas of the body.’ Survey participants were asked to report incidents occurring in the past 12 months. Meanwhile, the Department of Justice survey used to calculate sexual assaults nationwide asks participants if anyone has ‘attacked’ or ‘threatened’ them by ‘grabbing, punching, or choking’ or by ‘any . . . other sexual act’ over the course of the past six months.”). Others might place what appear, at first glance, to be an alarming number of incidents within the broader context of the unique structure of the military justice system, including RCM 306, which allows the superior commander to withhold the authority to dispose of offenses in specific types of cases (such as offenses arising under Article 120—Rape and sexual assault generally) based on a long list of enumerated factors. R.C.M. 306; Art. 120, Uniform Code of Military Justice, 10 U.S.C. § 886. Finally, others might argue that the recent changes in reporting procedures have, in fact, made it more likely that victims feel comfortable coming forward, thereby skewing the statistics in an unfavorable light by placing more emphasis on the issue. See, e.g., Steven Lee Myers, *A Peril in War Zones: Sexual Abuse by Fellow G.I.s*, N.Y. TIMES (Dec. 27, 2009), <http://www.nytimes.com/2009/12/28/us/28women.html?pagewanted=all&r=0> (“Senior Pentagon officials argued that the increase in reports did not necessarily signify a higher number of attacks. Rather, they said, there is now a greater awareness as well as an improved command climate, encouraging more victims to come forward.”); see also Krissah Thompson, *Gen. Flora Darpino, Army’s new judge advocate general, faces sexual-assault issue*, WASH. POST (Sept. 10, 2013), http://articles.washingtonpost.com/2013-09-10/lifestyle/41934904_1_justice-system-darpino-advocate (noting that the military justice system has taken special note of sexual assault issues by appointing special victims prosecutors, special victims investigators, and special victims liaisons to “develop a deeper sensitivity in such cases.”).

¹⁸² Rollins, *supra* note 11, at 379–80 (emphasis in original).

¹⁸³ Kubes, *supra* note 22, at 128.

¹⁸⁴ “FOB Queens” are the female combat service support soldiers attached to all-male combat units (i.e. cooks, medical assistants, human resources personnel, etc.). Male soldiers often refer to these female soldiers in derogatory terms—particularly in the context of Porta-Potty graffiti—but recognize that their options for female interaction are limited while deployed. Some of these FOB Queens “make the rounds,” all the while being told by male soldiers that they should “enjoy it” while they have the chance because once the unit returns to the United States, they will “go back to being ugly again—they may be an “8 or 9 out of 10” in Afghanistan, but will resort to being a “3 or 4” back at home. Based on author’s personal knowledge as a Military Police Officer in the United States

prolific in these settings. Increasing the number of female personnel on remote FOBs where this behavior is accepted, if not encouraged, will inevitably result in more women being victimized by their comrades.

Thus, the unfortunate reality is that “the strains of combat, close quarters in remote locations, tension, and even boredom can create the conditions for abuse,” not to mention “hinder[ing] medical care for victims and legal proceedings against those who attack them.”¹⁸⁵ These factors all explain why, even in egregious cases of sexual assault or harassment, victims often elect to remain silent rather than report the perpetrators with whom they continue to serve. As one Army Captain and victim of sexual assault explained, “[y]ou’re in the middle of a war zone. . . So it’s kind of like that one little thing is nothing compared with ‘There is an I[mprovised] E[xplosive] D[evice] that went off in this convoy today and three people were injured.’”¹⁸⁶

V. THE SOLUTION

Skeptics of inclusion are right to express their doubts given all the challenges associated with its implementation. Advocates of full integration have also cited various sound reasons for their belief that gender neutrality within the military represents long overdue forward progress. Some expressed their views well before the ongoing sexual assault epidemic became so publicly apparent; others spoke up more recently.¹⁸⁷ Implementing the inclusion policy and tackling the challenges associated with it, however, simply will not reduce the sexual assault epidemic without a broader and more systemic change in deep-rooted military culture.

The reality is that women should undoubtedly be allowed to serve in all combat positions for which they are qualified. Accessibility will undoubtedly continue to be an issue in the early pilot months of the inclusion process, but with time and the cooperation of key leaders, the “novelty” of having women eating, sleeping, and showering within close proximity of men will eventually wear off. Quite simply, many women can run faster, lift more, and shoot more accurately than their male counterparts.¹⁸⁸ While some claim that women are too “civilized” for combat, “[t]he historical evidence does not support the claim that women are incapable of being effective killers.”¹⁸⁹ Furthermore, “[p]ermitting men and

Army deployed to Iraq from September, 2008 until March, 2009, and to Afghanistan from May, 2013 until August, 2013.

¹⁸⁵ Myers, *supra* note 181.

¹⁸⁶ *Id.*

¹⁸⁷ See, e.g., Snyder, *supra* note 10 (pre-SAPRO era and pro-integration). *Contra* Elaine Donnelly, *Constructing the Co-Ed Military*, 4 LIBERTY U. L. REV. 617 (2010) (post-SAPRO era and anti-integration).

¹⁸⁸ See, e.g., Skaine, *supra* note 129, at 61 (“The *Washington Post* reported that accounts by men who have fought alongside women suggest that ‘what’s true for women generally may not be as true for women who join the military.’”).

¹⁸⁹ Hunter, *supra* note 176, at 87.

women to compete for all military occupational specialties is not an equal rights issue, but a matter of military effectiveness.”¹⁹⁰ Soldiers are soldiers—provided they all undergo the same training and receive the same equipment, their capabilities in combat are more than comparable.¹⁹¹

The lifting of the combat ban, however, is not the long-term solution to the military’s sexual assault epidemic. The reality is quite simple: sexual assault “is not a military problem. It is an American problem.”¹⁹² The military simply provides a unique context in which American problems are amplified. Despite the fact that many male soldiers have the utmost respect for women, respect is one thing; asking men and women to use the same latrines and shower facilities is something with which many males simply are not yet comfortable. As Micah Zenko and Amelia Mae Wolf point out, one need only spend a few minutes at a post or base to realize that the military is neither isolated nor insulated from American society, and, therefore, “[a]ddressing this assault crisis as solely a military problem would merely place another Band-Aid on a national wound.”¹⁹³

Furthermore, the military has long been resistant to change and often remains wed to traditions that have survived the test of time.¹⁹⁴ This inherent tendency to fight change (“if it ain’t broke, don’t fix it”) means that the recent inclusion policy will likely make things worse before it gets better. This is the consequence of lifting a ban that means nothing in practice but everything in terms of a long-standing, male-centric warrior culture.¹⁹⁵ Although tradition does not justify discrimination, government officials and lawmakers in Washington, D.C. have an obligation to do more for the women they are asking to volunteer for combat in context of the dirty, not-so-little, not-so-secret problem of sexual assault.

Thus, the real and incredibly problematic issue is undoubtedly the underlying culture and its associated stereotypes. Phyllis Schlafly may be wrong about the lifting of the ban being “contrary to our culture, to our respect for men and women, and to our belief in the importance of the family and motherhood”¹⁹⁶, but she does raise a legitimate concern about increased sexual assaults. The military needs to do more than lift the combat ban to change the culture that accepts this kind of abhorrent behavior. Sexual assault leaves an ugly stain on the record of an

¹⁹⁰ Skaine, *supra* note 131, at 73.

¹⁹¹ Holmstedt, *supra* note 129, at 223 (“Mayo thought about how the male Marines sometimes forgot that all Marines—male and female—are trained the same way. When they realized that Mayo was just as much a Marine as they were, they were fine with her.”).

¹⁹² Zenko, *supra* note 23.

¹⁹³ *Id.* (Micah Zenko is the Douglas Dillon fellow with the Center for Preventive Action at the Council on Foreign Relations. Amelia Mae Wolf is a research associate at the Council on Foreign Relations.).

¹⁹⁴ See, e.g., Maj. Jason Pape, *How the Army Resists Change*, *School of Advanced Military Studies* (2009), available at www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA506189.

¹⁹⁵ See Buchanan, *supra* note 112.

¹⁹⁶ Phyllis Schlafly, *Women Should Not Serve in Military Combat*, BIBLE RESEARCHER, <http://www.bible-researcher.com/women/schlafly3.html> (last visited Mar. 22, 2014).

institution lauded for its good order and discipline.¹⁹⁷ As Air Force Captain Megan Schmid explains, “[t]he current approach [to solving the sexual assault problem], which is focused on victim response, preventative education, and statutory reform, cannot target the root cause of the problem—the contemporary United States military culture.”¹⁹⁸ An increase in the number of women in service over the last several decades has resulted in a concurrent increase in the number of assaults. House Armed Services Committee ranking member Adam Smith, confirms that the ongoing crisis is a “‘deep cultural problem’ that legislation alone won’t fix.”¹⁹⁹ To echo these sentiments, Representative Jackie Speier, who has pushed for better ways to investigate sexual assault cases, said women are left with no “safe haven” in war zones: “It comes down to the culture . . . [It] hasn’t changed, no matter what the generals or the secretaries of Defense say about zero tolerance. They have not scrubbed the sexism . . . out of the military.”²⁰⁰

As senior officials consider sweeping changes for women, the persistence of sexual assault, perhaps best demonstrated by the recent scandal at Lackland Air Force Base, suggests that the military “needs to improve its culture to root out problems, such as binge drinking and vulgar images, that can be conducive to sexual harassment.”²⁰¹ In his remarks about sexual misconduct before the House Armed Services Committee, General Mark A. Welsh III, the Air Force Chief of Staff, confirmed that these obscene images, songs, and stories “are not things we value, and they ultimately degrade mission effectiveness and hurt unit morale.”²⁰² To this end, commanders at all levels should be held accountable when they are the perpetrators, despite their high rank or position.²⁰³ The military is “effective in

¹⁹⁷ Smith, *supra* note 22, at 148.

¹⁹⁸ Megan N. Schmid, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 505 (2010).

¹⁹⁹ Leo Shane III, *Panel Ties Sex Assault Reform to Bill*, STARS AND STRIPES, June 6, 2013, at 3.

²⁰⁰ Zoroya, *supra* note 19.

²⁰¹ Barnes & Nissenbaum, *supra* note 118.

²⁰² Statement of General Mark A. Welsh, III, U.S. Air Force, *Update on Basic Military Training Sexual Misconduct: House Armed Services Committee* (Jan. 23, 2013) (transcript available at <http://docs.house.gov/meetings/AS/AS00/20130123/100231/HRG-113-AS00-Wstate-RiceG-20130123.pdf>).

²⁰³ Michael Biesecker, *Generals Deny Outside Pressure to Try Sinclair*, STARS AND STRIPES, June 6, 2013, at 3 (describing how, in response to allegations that they were pressured to charge and prosecute a colleague who faces a court-martial on several charges, including forcible sodomy, indecent acts, violating orders, and adultery, General Dan Allyn and Major General Jeffrey Colt insisted that they weighed the evidence carefully and denied any attempt to make an “example” of Sinclair). At trial, General Sinclair ultimately pled guilty to “adultery, mistreating the captain [with whom he had an affair], misusing his government charge card in order to pursue the affair, disobeying an order not to contact the captain, making sexist comments about other female officers, impeding an investigation by deleting sexually explicit emails to and from a civilian woman, possessing pornography in a war zone, conducting inappropriate relationships with two other female officers and improperly asking a female lieutenant for a date.” For these offenses, he received only a

changing behavior in other contexts because it uses a strict chain of command; thus, commanders can play a vital role in shaping the military culture.”²⁰⁴ All too often, however, commanders do not practice what they preach. Thus, in context of tradition-laden force like the military, changing the culture via the leaders that shape it is the only path to success in implementing the inclusion policy and eradicating sexual assault. Defense Secretary Hagel argued that “zero tolerance” must be made to conform to the military’s chain of command module in holding parties responsible from the top of that chain to the bottom.²⁰⁵ Conformity may not always be a “good thing,” per se; to change the military culture and, ironically, effect meaningful change, however, it may be the only answer.

CONCLUSION

The age-old stereotype of men on the front lines and women in the rear has long been contradicted by the reality of today’s armed forces. The DoD’s recent change in policy simply makes this reality official. Still at large, however, is the ongoing crisis of sexual assault within the military’s ranks. This is a problem that, in the words of Chairman of the Joint Chiefs of Staff Lieutenant General Martin E. Dempsey, “rips at the bond of trust that binds us together,” much in the same way that racial tension and drug abuse did several decades ago.²⁰⁶ In other words, “[s]exual assault is a value issue because it is fundamentally at odds with the obligation of servicemen and women to treat all with dignity and respect, and it is a leadership issue because those who seek to be future leaders . . . are obligated to uphold certain standards of conduct in themselves and in response to the conduct of others.”²⁰⁷ Army Chief of Staff Raymond T. Odierno recently called upon all leaders to start conversing within their units about the issue in the hope of developing solutions to the problem.²⁰⁸

reprimand and a \$20,000 fine. Robin Abcain, *Is Anyone Really Surprised that Brig. Gen. Sinclair Got Off Easy?*, LA TIMES (Mar. 20, 2014), <http://www.latimes.com/local/abcarian/la-me-ra-brig-gen-sinclair-got-off-easy-20140320,0,6157965.story#axzz2wtHw9S3M> (“We’re talking about a culture where commanding officers overturn actual rape convictions because they feel like it.”); see also Richard A. Oppel Jr., *Sexual Misconduct Case Ends With No Jail Time for General*, N.Y. TIMES (Mar. 20, 2014), http://www.nytimes.com/2014/03/21/us/general-sinclair-is-sentenced.html?hpw&ref=us&_r=0 (describing how General Sinclair’s sentence involved forfeiting \$5,000 of his pay for a period of only four months and will allow him to retain his retirement pension and other service-related benefits).

²⁰⁴ Schmid, *supra* note 198, at 505.

²⁰⁵ Woodruff, *supra* note 60.

²⁰⁶ Secretary of Defense Chuck Hagel & Chairman of the Joint Chiefs of Staff General Martin E. Dempsey, Department of Defense News Briefing with Secretary Hagel and Gen. Dempsey from the Pentagon at the Pentagon Briefing Room (May 13, 2013) (transcript available at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5241>).

²⁰⁷ Friedman, *supra* note 54, at 392.

²⁰⁸ General Raymond T. Odierno, *Army Mission: Stop Sexual Assault, Harassment*, BAYONET & SABER, May 22, 2013, at A2.

Because the policy of opening historically male-only combat positions to women will cause an increase in the frequency of service-member on service-member sexual assaults, nothing short of a drastic change in military culture will ensure the long-term success of the pending inclusion policy. Hence, this is the perfect time to make a statement about how women deserve to be treated and eliminate the hyper-masculine cultural stereotypes that allow for a climate rife with sexual assaults to prosper. Female warriors deserve the best this country and its military has to offer, and that does not include victimization at the hands of those tasked with watching their "six."²⁰⁹ Women have existed on the battlefield for centuries, but Americans have struggled to acknowledge them in that role. Ultimately, however, women are not "struggling for sameness. They are struggling for equality."²¹⁰ This equality will make our military better. It will make the experiences of our male and female service members better. It may not solve the problem of sexual assault, but it will ensure that women do not allow this ongoing epidemic to control their future. Lastly, but certainly not least, it will make America better. America is touted as the land of the free and the home of the brave. It is time to change the culture that enables cowardice and indecency and make it free for those who are bravest, once and for all.

²⁰⁹ This is military slang for "having their back." In other words, "watching your six" means maintaining vigilant security of oneself and one's unit. Based on author's personal knowledge as a Military Police Officer in the United States Army Military Police Corps from September, 2007 through the present.

²¹⁰ Holmstedt, *supra* note 129, at 314.